if the security be inadequate, but he should not at least cause him loss by interposing his own competing claim. Further it is suggested that this principle is merely the converse of that by which the vendor of part of an incumbered estate is held not entitled to contribution from the vendee in paying off the incumbrance, *Clowes* v. *Dickinson* (1821) 5 Johns. Ch. 235, and from which is derived the rule that where a part of mortgaged premises has been alienated a decree of foreclosure must direct the part still held by the mortgagor to be sold first. It would follow from this reasoning that a subsequent assignee of another installment of the debt, though he gets an equal equity, is barred by the priority in time of the claim of the first assignee.

Some states, however, adopt the rule, that the priority of any note is determined by the date of its maturity. Pomeroy's Equity Jurisprudence §§ 1201–1203; *Isett* v. *Lucas* (1864) 17 Iowa 503; *Aultman-Taylor Co.* v. *McGeorge* (1884) 31 Kan. 329. These cases apply this rule even as between assignor and assignee; but Indiana, following Pomeroy's opinion, has very inconsistently confined it to the determination of priorities between assignees, who as *Alden* v. *White* declares, are always preferred to the assignor. *Parkhurst* v. *Watertown Steam Engine Co.* (1886) 107 Ind. 594. This theory in any form seems objectionable because it rests on an unwarranted separation of the single mortgage into several to correspond with each successive note, and because, in assuming that the right of the holder of the earliest maturing note to enforce it by foreclosure gives him a preference, it violates the principle that it is the time of the creation of liens, not that of their enforcement, which regulates the mutual rights of the holders.

The position of the opposing decisions, that all parties stand *in æquali jure*, is defended on the ground that as no portion of the debt is entitled to preference while all is held by the mortgagee, he cannot be presumed to give another a better right than he himself possesses. It is also said to be supported by the doctrine that in the application of the proceeds of the sale of a security for several debts, all must be paid *pro rata*, whether otherwise secured or not. *Orleans Co. Nat. Bank* v. *Moore* (1889) 112 N. Y. 543. But these rules are made for the protection of the mortgagor and the sureties for his debts and, whatever the equities they may create, they hardly apply to the present class of cases, where the mortgagor is an entirely indifferent party. If the debts secured by the mortgage were separate and distinct transactions, there would be reason for holding that the mortgage should under all circumstances be divided proportionally between them; but where it stands as security for what is really one obligation, it should not be material whether the latter is single or in the form of a series of notes or bonds. If this *pro rata* rule is to be preferred it is because it is based on an equally fair interpretation of what was contemplated by the parties; its application is not affected by the equities of the mortgagor and his sureties; and it avoids obvious hardship to subsequent assignees.

ATTEMPT TO ENJOIN SUBWAY CONSTRUCTION IN NEW YORK CITY.— The New York Supreme Court has, for the second time refused to enjoin the construction of the New York City Subway through Park Avenue. *Barney* v. *City of New York* (1903) 39 Misc. 719. A pre-

vious action for the same relief but brought by the plaintiff as a taxpayer instead of as an injured property owner was, some months ago, dismissed by GIEGERICH, J. *Barney* v. *City of New York* (1902) 38 Misc. 549. In each case it appeared that the defendants were following a route substantially nearer the house line than was provided for by the plans under which alone the work could lawfully be done. This caused appreciable damage to the abutting property owners, of whom the plaintiff was one, from the increased noise and vibration from the blasting, and threatened future damage from vibration when the road should be in operation. In each action the plaintiff was defeated by the fact that if the work were stopped by injunction the public would be greatly inconvenienced, as the completion of the subway is an urgent necessity for the comfort of a large portion of the urban population.

The position of GIEGERICH, J., in the first decision seems sound. There inasmuch as the plaintiff sued as a representative of the public it was a proper subject of inquiry whether, in fact, the public welfare demanded the success of the action, *Rogers* v. *O'Brien* (1897) 153 N. Y. 357, and it was properly decided that it did not. But was LEVENTRITT, J., justified in dismissing on the ground of "public interest" the second action, in which the plaintiff sued simply as the owner of property for the protection of his property rights?

Examination of the authorities shows that public convenience has been considered as a factor in granting or withholding equitable relief in private litigation in several classes of cases. The first intimation of such a doctrine is in *Barnes* v. *Baker* (1752) Ambler 158; s. c., *sub. nom. Anon.* 3 Atk. 750. There, in dismissing a bill to enjoin the erection of a smallpox hospital next to the plaintiff's land, primarily on the ground that it was a public nuisance if any, LORD HARDWICKE is reported by AMBLER to have said: "I am of opinion it is a charity like to prove of great advantage to mankind." The question of the application of the doctrine has frequently arisen under the constitutional inhibitions of taking property without compensation. In the ordinary case the direct taking of property without compensation will be enjoined, irrespective of public convenience, at least until compensation is made. *Storck* v. *El. Ry.* (1892) 131 N. Y. 514; *Chambers* v. *R. R. Co.* (1882) 69 Ga. 320. But equity will not at the expense of public or private interests lend its aid to the protection of a bare technical right, as where the taking, consisting only of the deprivation of easements of light, air, and access, actually enhances the value of the property to an amount exceeding the damage done. *Gray* v. *El. Ry.* (1891) 128 N Y. 499; *O'Reilly* v. *El. Ry.* 148 N. Y. 347. Again, ROMILLY, M. R. in *Wood* v. *Charing Cross Ry.* (1863), 33 Beav. 290 treated the public convenience as a determining factor in dismissing a bill to enjoin the further construction of a railroad through the plaintiff's land. The defendant, required by charter to give compensation, under an honest mistake as to the true value of the plaintiff's land had begun work, the plaintiff making no objection, without making full compensation. And so even where an absolute injunction would have been granted at the inception of the injury, subsequent relief has been denied on the ground of public convenience and disproportionate injury to the defendant, the plaintiff's injury being such as could be readily com-

pensated by damages. *Becker* v. *Lebanon R. R. Co.* (1898) 188 Pa. St. 484. Further, where the act threatened does not amount to anything more than consequential damage and would be lawful but for a state constitutional provision that property shall neither be taken nor damaged, without compensation, it is held that the inconvenience to the public from granting an injunction will constrain a refusal thereof *Doane* v. *El. Ry.* (1896) 165 Ill. 510; *Moore* v. *Atlanta* (1883) 70 Ga. 611; *McElroy* v. *Kansas City* (1884) 21 Fed. 257.

In the principal case the nuisance created by the construction work was temporary in character. Further if the injunction was granted and work proceeded on the authorized route the nuisance would not be materially lessened and would be without remedy. *Booth* v. *Rome R. R.* (1893) 140 N. Y. 262. If the work was delayed until the new route was authorized the existing nuisance would merely be postponed and then would be without remedy. Considering the importance of the public interest involved and the disproportion between the injury to the plaintiff if the work continued and to the defendant if it was stopped, it would seem that the court was well within its discretion in taking into account these practical considerations and refusing an injunction. The court also properly refused to recognize as a ground for an injunction the prospective injury from the vibration due to the running of trains. There is ample time for the change in route to be authorized before the trains begin to run. Moreover the prospect of there being any appreciable damage from the operation of the road is so uncertain and the impracticability of determining at this time what the compensation should be, if indeed the injury were held to be a taking of property, is so patent, that it is hardly necessary to resort to the doctrine of public convenience to justify the refusal to interrupt the work on the second ground of the application. Assuming however, that the new route be authorized, but that the vibration from the operation of the road does prove to impair seriously the plaintiff's enjoyment of his property it then will be an interesting question under the New York decisions, whether this continuing injury from vibration be a taking of property within the meaning of the constitution? It has been decided that temporary injury caused by vibration from blasting, done in opening a route for a railroad, is not actionable. *Booth* v. *Rome R. R.*, (1893) 140 N. Y. 267. But *Garvey* v. *Long Island R. R.* (1899) 159 N. Y. 323, suggests a different rule as to continuing injury. While the case might have been put entirely on another ground, the actual decision seems to support the proposition that permanent vibrations, which appreciably affect one's land, are an actual taking of property for which compensation must be made. If this view be taken, mere authorization and the fact that the road is a public benefit will, under previous decisions, be no ground for refusing to enjoin its actual operation until compensation be made. *Ambrose* v. *Buffalo* (1892) 20 N. Y. Supp. 129; *Storck* v. *El. Ry.*, *supra*. It will be necessary to go further and find from an interpretation of the Rapid Transit Acts that the nuisance is being created under direct governmental command. Then relief might be refused, perhaps, under the doctrine of *Fries* v. *N. Y., N. H. & H. R. R. Co.* (1902) 169 N. Y. 270, and *Muhlker* v. *Same* (1903) 173 N. Y. 549, discussed respectively in 2 COLUMBIA LAW REVIEW 158, and 3 id. 347.